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**No. 82-1000**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1982

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HENRY P. HALSELL,  
*Petitioner,*

vs.

KIMBERLY-CLARK CORPORATION,  
*Respondent.*

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On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Eighth Circuit

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**RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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JAMES M. McHANEY  
OWENS, McHANEY & CALHOUN  
1021 First National Building  
Little Rock, Arkansas 72201  
501/372-3466  
*Attorneys for Respondent*

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**REASONS WHY THE WRIT SHOULD  
NOT BE GRANTED**

The first reason why this Court should not issue a writ of certiorari in this case is that the decision below in no way conflicts with applicable decisions of this Court. Contrary to petitioner's assertion, the Court of Appeals' decision is entirely consistent with *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and predecessor cases. Here, the Court of Appeals reviewed the evidence produced by petitioner and conclud-

ed that he had failed to show by a preponderance of the evidence that his job performance met Kimberly-Clark's legitimate expectations. Accordingly, the Eighth Circuit concluded that petitioner had not shown that he was "qualified" for the job at issue and, thus, had not produced evidence sufficient to make a prima facie case of employment discrimination under the criteria set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) (A-8 and A-9). In this context, the decision below was entirely proper and consistent with prior decisions of this Court.

The Eighth Circuit also recognized that *Burdine and Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), sanction the establishment of a prima facie case where the *McDonnell-Douglas* criteria are not met but the plaintiff produces "sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion." (A-9) Even under this liberal standard, the Court of Appeals concluded, based on its examination of the record, that petitioner failed to establish a prima facie case of age discrimination. The evidence adduced by the petitioner showed that (1) he was 56 years old when hired and 57 when discharged, (2) the dismissal was in the context of business operations, (3) the average age of employees working on the Orizaba project with petitioner was 47 years, and (4) at least eight senior management employees were as old or older than petitioner. Further, he never stated during his extensive testimony that his age had anything to do with his discharge and none of his supporting witnesses made such a claim. Viewed in this light, petitioner certainly did not produce evidence sufficient to permit an inference of age discrimination.

The Court of Appeals, by way of dictum, went on to state that even assuming petitioner had established a prima facie case of age discrimination, respondent's rebuttal "overwhelmingly" established a legitimate, non-discriminatory reason for

discharging petitioner. (A-9) Again correctly applying *Burdine*, the Eighth Circuit concluded that "by satisfying its burden of production, Kimberly-Clark eliminated any inference of discrimination raised by Halsell's prima facie case." (A-11). Further, the Court of Appeals found that respondent's rebuttal case was so strong as to "completely undercut any suggestion that Kimberly-Clark discharged Halsell because of his age" and therefore "a jury could not reasonably have found age discrimination a factor in his discharge." (A-13) This finding, too, is entirely consistent with *Burdine* and prior decisions.

The second reason why this Court should not issue a writ of certiorari in this case is that the evidentiary burdens in employment discrimination cases are now well established by prior decisions of this Court. See, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Therefore, consideration of this case would serve no useful purpose.

The third reason this Court should not issue a writ of certiorari is that petitioner made no offer of proof after a verdict was directed against him on his age claim. Further, the record makes clear that petitioner presented his entire case and had an opportunity to rebut Kimberly-Clark's evidence on the age claim. Therefore, petitioner cannot now claim that he was denied an opportunity to present evidence. Both the District Court and the Court of Appeals found that his evidence was insufficient to create a jury question and this Court need not involve itself in a third review of the facts.

### **CONCLUSION**

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

**JAMES M. McHANEY  
OWENS, McHANEY & CALHOUN  
1021 First National Building  
Little Rock, Arkansas 72201  
501/372/3466  
Attorneys for Respondent**

### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was served by mailing a copy, postage prepaid, to Mr. Bill R. Holloway, P. O. Box 391, Lake Village, Arkansas, 71653, Attorney for Henry P. Halsell, on the 10th day of January, 1983.

James M. McHaney